

SPEECH IN PRAGUE

Money laundering

- *The present status of the Second Directive on money laundering and the manner in which the enabling legislation has been adopted across the EU.*
- *Implementation of the Third Directive on money laundering - what does it mean for Lawyers?*
- *Are there ways for lawyers to lobby locally to improve subsequent enabling regulations and to have the unique status of lawyers recognised?*
- *CCBE view on consistent/harmonised application of the Money Laundering Directives across the countries of the EU.*

European lawyers and the prevention of money laundering

The European Community efforts to combat money laundering are reflected in the Directives of 1991 and 2001, and now, in the directive of June, 7 2005.

The 1991 Directive closely follows the recommendations of financial action task force on money laundering (FATF), the world standard in this area. The 1991 directive defines money laundering in terms of drugs offences and imposes obligations solely on the financial sector.

The 2001 amendment extended to scope both in terms of the crimes of the range of professions and activities covered. Thus, the 1991 directive included the lawyers in its scope.

The 2001 directive left open the precise definition of serious underlying offences for the definition of money laundering and called on the Commission to carry out a particular examination of the specific treatment of lawyers and of all the independent legal professions within the two years of the entry into force of this directive.

Whereas this review has not been made today, the European Council of the Parliament has adopted a new directive on June 7th , on the same basis than the second directive.

The third directive has been adopted to take into account the recommendations of the FATF published in June 18, 2003. In a number of areas the FAFT considerably extended the level of details in its recommendations, notably as regards customer identification , the situations were high risk of money laundering may justify enhanced measures and also situations where the risk is reduced may justify less rigorous controls.

The EU members states believe that the revised FAFT 40 recommendations should be applied in a coordinate way at E.U level.

For the sake of clarity, it has been decided to have a new autonomous text repealing the existing directives.

The commission's starting point is that the new directive should build on the current acquis and that the existing provisions, in particular as regards the treatment of the professions should not be called into question where there is no need to do so.

It is in such a context, that the third directive has been adopted by the Parliament and the Council on June 7th 2004.

Today, the main concern for the European Lawyers is the following : the lawyers have been brought within the scope of the Community anti-money laundering regime. That means that the legal professions are put into the obligation to report suspicions of money laundering or terrorist financing on their clients. That is the principle.

There are exemptions for any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal provisions for a client.

Whereas it is said that the legal advise shall remain subject to the obligation of professional, the exemptions are very narrow.

For the European lawyers, the wording used by the European Regulation, is not a good wording because the principle is the obligation of reporting and the exemption is only some information received in certain circumstances.

We called on the modification of the wording in order to clarify the obligations of the lawyer and to distinguish between the activity of counsel for legal advise or for representing or assisting before the Court, and the others activities which can be allowed in some European countries in which the lawyer is bound by the instructions received from his client as proxy or trustee. We consider that the directive breaches the professional secrecy principle.

We also consider that the third directive is not compatible with the principle of legal security. Thus the definition of the underlying offence is unclear, and the definition of the offence by the threshold of the penalty (one year of deprivation of liberty) is not in accordance with the harmonisation of the European regulation.

In addition, the third directive considerably extended the level of detail with the range of measures that the persons subjected to the directive must take in order to make sure that they know

their customer understand the nature of the financial and business activities. Because it has been considered that the general requirements of the previous directive on the beneficial ownership no longer was not sufficient.

The basic principle is that customer identification and verification should be complete before the business relationship is established.

It is now clearly stated that if customer identification can not finally be carried out in a satisfactory way, the relationship should be terminated.

Theoretically, the national financial intelligence unit is the body responsible for receiving and processing the law port of suspicious transactions.

But it is allowed for the lawyer to report the suspicion to the bar but now the bar has the obligation to transmit the report without the possibility not to do so.

The tipping off which was allowed for the lawyers is now prohibited.

The main consequences of this directive are the following :

The second and the third directives have breached the principles of the professional secrecy of the lawyers by enacting the obligations of reporting their suspicions on their clients.

The lawyers have to fulfil a special duty for the state.

As the Supreme Court of Britannia Columbia, in CANADA, has ruled it, the obligation of reporting for the lawyers was breached against its independence. Therefore, the implementation of the FATF recommendation in CANADA has not be done.

In Europe, the Court of Appeal in London decided that the lawyer has no special obligation of reporting when he has to assist his client in a share after divorce however in such an activity, the lawyer does not act as a legal adviser or in a judicial matter.

In Belgium, the local bars have submitted the issue of the conformity of the Belgium in implementing law with the European principles of the Treaty of European Convention of Human Rights and the Constitutional Court and the Court has referred the question to the European Court of Justice.

We invite the national bars to be mobilised against the implementation of the third directive in order to obtain a correction of this text in the line with the treaties of European Union and the European convention of human rights.